Lines, Lines, Everywhere a Line: Common Ethical Issues in the Criminal Law Practice (An Ethical Homage)

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INTRODUCTION

The title of this presentation is "*Lines, Lines, Everywhere a Line*[1]*: Common Ethical Issues in the Criminal Law Practice*." Criminal defense practitioners often face circumstances that raise various ethical issues; many of these issues arise repeatedly. These issues sometimes bring the lawyer all the way up to the ethical lines laid down within the Rules of Professional Conduct.

These materials should give guidance on some of the more common issues; this is most certainly not an exhaustive treatment. The materials should at least cause you to raise the ethical question. But remember, as the "Scope" portion of the RPC stated, "the Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Scope, ¶ [1], Rule 407, SCACR.

As noted, this list is by no means a complete outline of issues you may face as criminal defense practitioners. This outline covers the following specific issues:

I. Conflicts of Interest - Current and Former Clients; Screening
II. Confidentiality, Discovery Issues, Technology and War Stories
III. Communication
IV. Documenting the File
V. Duty to Report
VI. Civility Oath

Not all of the rules of conduct are found in Rule 407, SCACR, which contains the RPC. Some are found elsewhere. For instance, Rule 417, SCACR, contains a comprehensive set of rules governing financial recordkeeping. Importantly, Rule 413, SCACR, also provides rules governing lawyer conduct. Rule 413 contains the Rules for Lawyer Disciplinary Enforcement (RLDE). If you have not read these rules, then do so. Specifically, read Rule 7, RLDE, which provides "Grounds for Discipline." Rule 7 provides *separate* grounds for imposing discipline upon lawyers who commit misconduct.

[1] An ethical homage to The Five Man Electrical Band's 1971 song.

I. Conflicts of Interest: Current and Former Clients; Screening

The primary rules governing conflicts of interest are found in Rules 1.7 through 1.14. Not all of these rules apply to lawyers employed as a public defender. Some of the more common issues are as follows.

A. Current Clients

Rule 1.7 governs conflicts involving "current clients." The Rule provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> > (1) the representation of one client will be directly adverse to another client; or
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> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> > (2) the representation is not prohibited by law;
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> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
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> > (4) each affected client gives informed consent, confirmed in writing.

Pertinent **comments** to Rule 1.7 explain:

> **Prohibited Representations**
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> [12] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that

the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[13] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[14] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

* * *

Conflicts in Litigation

[21] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[22] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk

include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

* * *

[23a] A lawyer serving as a part-time prosecutor is not necessarily disqualified from simultaneously representing other civil or criminal defense clients in private practice. If the prosecutions handled by the lawyer are limited in nature and scope, the lawyer may be able to represent other clients in criminal or civil matters that are not related to any of the cases that the lawyer has prosecuted.

(Underline added).

Rule 1.8, RPC, adds specific rules governing conflicts for current clients. Many parts of Rule 1.8 might arise in a specific circumstance, but the most common is found in Rule 1.8(g), which provides:

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 1.8(g). The Comments to the Rule explain:

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(g) (definition of informed

> consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

(Underline added).

Rule 1.10 provides in part:

> (e) A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if:
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> > (1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and
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> > (2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

(Underline added). The comments explain:

> [9] Rule 1.10(e) allows programs providing legal services to indigents to avoid imputed disqualification by screening lawyers from conflicting matters within the office. See Rule 1.0([m]) for screening procedures. The authorization of screening is intended to increase the number of persons to whom each program can provide legal services, while at the same time protecting the clients from prejudice. Paragraph (e) applies only to programs of the type delineated and does not authorize screening by private law firms to avoid imputed disqualification.

Rule 1.0(m) sets forth the screening procedures. The rule states:

> (m) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

The Comments to Rule 1.0 explain:

> **Screened**
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> [8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.8(l), 1.10(e), 1.11, 1.12 or 1.18.
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> [9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.
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> [10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

B. Former Clients

The primary rules governing former clients are Rule 1.9, Rule 1.11, and Rule 1.12. These rules are fairly fact-specific, and permit a waiver with informed consent.

Rule 1.9 provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(Underline added).

Rule 1.11 governs "Special Conflicts of Interest for Former and Current Government Officers and Employees." The Rule provides:

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12 governs a lawyer who was a former judge, arbitrator, mediator or other third-party neutral. The prohibitions and permissions mirror those in Rule 1.11. The Rule provides:

> (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.
>
> (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.
>
> (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
>
> > (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> >
> > (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
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> (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

(Underline added).

II. Confidentiality, Discovery Issues, Technology and War Stories

Confidentiality is governed by **Rule 1.6, RPC**, which provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to prevent the client from committing a criminal act;
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> (2) to prevent reasonably certain death or substantial bodily harm;
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> (3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
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> (4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
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> (5) to secure legal advice about the lawyer's compliance with these Rules;
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> (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (7) to comply with other law or a court order.

(Underline added). The Comments to the Rule explain:

> [1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b)

and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(g) for the definition of informed consent. Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

[5] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[6] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client

when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. The lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. Paragraph (b)(2) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[8] Paragraph (b)(3) does not limit the breadth of Paragraph (b)(1), but describes one specific example of a situation in which disclosure is permitted to prevent a criminal act by the client. Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule

and requires disclosure, paragraph (b)(7) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(7) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[17] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

> [18] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.
>
> **Former Client**
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> [19] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

(Underline added).

This Rule is probably one of the most misunderstood rules in the RPC. Currently the ABA is considering an amendment to the Model Rule 1.6 since any disclosure of facts about a client's case, even "war stories," may violate the rule.

Some recent examples of violation of Rule 1.6:

1. *In re Cooper*, 397 S.C. 339, 725 S.E.2d 491 (2012)

> In April 2008, Respondent was appointed to represent Complainant through his contract with the Dorchester County Public Defender's office. During the case, Respondent received discovery materials from the solicitor's office. While in court on another matter, Respondent was approached by Complainant's cellmate. The cellmate informed Respondent that Complainant wanted Respondent to send the discovery materials via the cellmate. Respondent complied with the request and gave the discovery materials to the cellmate. Respondent did not have written permission from Complainant instructing him to give the discovery materials to the cellmate and had not spoken directly with Complainant regarding this transmission. After Respondent's contract with the Public Defender's office expired on June 30, 2008, new counsel was appointed to represent Complainant. Respondent admitted that his actions were improper.

2. *In re Poff*, 394 S.C. 37, 714 S.E.2d 313 (2011)

Respondent admits to violating Rule 1.6(a), RPC, Rule 407, SCACR, by disclosing private details of the circumstances surrounding Assistant's divorce action to his friend through e-mail. These disclosures included intimate details about Assistant's marital relationship and the financial settlement Respondent secured for her.

* * *

Assistant worked for Respondent from June 7, 2005 until May 4, 2007. During this time, they shared a good working relationship and Assistant considered them to be friends. Assistant claims she was unaware that Respondent had feelings beyond friendship until May 2, 2007, when Respondent gave her a romantic birthday card coupled with a typed note that revealed his feelings for her.

On May 4th, while looking in Respondent's office for a client file, Assistant noticed an e-mail on Respondent's computer of which she was the subject. The e-mail referenced Assistant in a sexually explicit manner. Assistant immediately printed the e-mail and left the office with the intention of never returning.

At home, Assistant used Respondent's password to access his e-mail and printed the e-mails Respondent exchanged with his friend during the time she worked for Respondent. These e-mails contained offensive and objectifying language about Assistant, unauthorized photographs of Assistant, and confidential information about her divorce settlement. It is undisputed she accessed Respondent's e-mails for her own purposes and not in furtherance of any duty she owed Respondent as an employee.

3. *In re Sturkey*, 376 S.C. 286, 657 S.E.2d 465 (2008)

ODC received a complaint from the husband of Client H, alleging respondent engaged in confidential conversations with Client H in front of law enforcement officers and respondent failed to provide her with competent and diligent representation.
The Court agreed with the Panel's finding of a violation of Rule 1.6 with regard to Client H.

4. *In re Boyce*, 364 S.C. 353, 613 S.E.2d 538 (2005)

Borrower told respondent that the attorney's fee was to be paid by Wells Fargo. When Wells Fargo did not pay the $150.00 fee, respondent faxed a letter to Borrower and to Borrower's employer at their place of business. The letter threatened to sue both Borrower individually and the employer's business and to

send a copy of the lawsuit to both the Attorney General and the Better Business Bureau so as to gain an advantage in the collection of her civil debt. Respondent's letter threatened treble damages even though she would not be entitled to treble damages under South Carolina law.

Neither Borrower's employer nor the employer's business were a party to the loan. Neither Borrower's employer nor his business were clients of respondent. Despite this fact, respondent revealed information relating to her representation of Borrower to his employer without Borrower's consent.

The Court found a violation of Rule 1.6.

5. *In re White*, 363 S.C. 523, 611 S.E.2d 917 (2005)

Respondent breached confidentiality by discussing in detail the facts of [Client A's] case with his wife, who then shared the details with Client A.

6. *Lucas v. State*, 352 S.C. 1, 572 S.E.2d 274 (2002)

Issue on Appeal: "Where an attorney forms a good faith basis for suspecting his client is about to present perjured testimony, and thereafter reveals the suspected perjury to the trial court and moves to be relieved as counsel, does the trial court's denial of the motion to be relieved constitute an abuse of discretion, depriving the defendant of a fair trial?"

The Court stated:

> Pursuant to Rule 407, SCACR, Rules of Professional Conduct (RPC), Rule 3.3:
>
> (a) A lawyer shall not knowingly ...
>
> (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1. 6.
>
> (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 1.6(b) of the RPC permits an attorney to reveal client confidences to the extent the lawyer reasonably believes necessary ... [t]o prevent the client from committing a criminal act.... The notes following Rule 1. 6 recognize an exception

to the general prohibition against disclosure in that a lawyer may not counsel or assist a client in conduct that is criminal or fraudulent, see Rule 1.2(d), and has a duty under Rule 3.3(a)(4) not to use false evidence. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1)(lawyer must withdraw from representation if representation will result in violation of the Rules of Professional Conduct or other law).

In *Matter of Goodwin*, 279 S.C. 274, 305 S.E.2d 578 (1983), this Court addressed the appropriate action of a trial judge when faced with the situation of an attorney attempting to withdraw due to suspected client perjury. We stated,

> While an attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony, the defendant has a constitutional right to representation by counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963). Had the trial judge allowed the withdrawal, any new attorney he appointed would, if faced with the same conflict, have moved to with-draw, potentially resulting in a perpetual cycle of eleventh-hour motions to withdraw. Worse, new counsel might fail to recognize the problem and unwittingly present false evidence.FN5
>
> > FN5. Although language in Goodwin indicated counsel was prohibited from disclosing the suspected perjury, it was written in 1983, prior to adoption of the Rules of Professional Conduct, which became effective in September 1990, and which specifically permit disclosure of client confidences if necessary to prevent a criminal act.
>
> ... [M]otions to withdraw must lie within the sound discretion of the trial judge. In making the decision, the trial court must balance the need for the orderly administration of justice with the fact that an irreconcilable conflict exists between coun-sel and the accused. The court should consider the timing of the motion, the inconvenience to the witnesses, the period of time elapsed between the date of the alleged offense and the trial, and the possibility that any new counsel will be confronted with the same conflict.

279 S.C. at 276-77, 305 S.E.2d at 579 (emphasis supplied). Here, it is patent that any new attorney would have been confronted with the same dilemma. Moreover, the motion to be relieved came nearly half way through a very serious trial. We

find no abuse of discretion in the trial court's denial of the motions to be relieved and for a mistrial.

III. Communication

As mentioned above, **Rule 1.0** provides definitions for the terminology used in the RPC. For instance:

> (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
>
> (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
>
> (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
>
> * * *
>
> (g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
>
> (h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
>
> * * *
>
> (p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

The Comments explain:

> **Informed Consent**
>
> [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. *See*, *e.g.*, Rules 1.2(c), 1.6(a), 1.7(b), and 1.18(d). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.
>
> [7] Obtaining informed consent will usually require an affirmative response by the client or other person. I n general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b), 1.9(a), and 1.18(d). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Failure to communicate was the number one complaint that clients made about lawyers for a long time; now, it's diligence and competence, but communication is a close third. Just for

2021, the following cases described "failure to communicate" as one of the findings of misconduct:

1. *Matter of Kern*, Order (S.C. Sup. Ct. filed Aug. 4, 2021) (Shearouse Adv. Sh. No. 27 at 81) (Court accepted lawyer's resignation in lieu of discipline for the lawyer's "egregious pattern of conduct" violating several rules, including Rule 1.4 (failing to explain transactions to the extent necessary to permit clients to make informed decisions regarding the representation)).

2. *Matter of MacLean*, Op. No. 28044 (S.C. Sup. Ct. filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 14) (3-year suspension for numerous matters of misconduct, including violation of Rule 1.4 for failing to respond to several bankruptcy clients who attempted to contact her, failing to respond to the Trustee, and failing to respond to the Bankruptcy Court).

3. *Matter of White*, Op. No. 28038 (S.C. Sup. Ct. filed June 23, 2021) (Shearouse Adv. Sh. No. 21 at 18) (3-year suspension for, in part, failing to keep client reasonably informed about the status of a matter).

4. *Matter of Melnyk*, 433 S.C. 393, 859 S.E.2d 257 (2021) (public reprimand for, among other things, failure to respond to client communications).

5. *Matter of Smiley*, 433 S.C. 253, 857 S.E.2d 894 (2021) (4-month suspension for, in part, failing to respond to numerous requests from the Court of Appeals to cure deficiencies in an appeal from an *Alford* plea).

6. *Matter of Jackson*, 433 S.C. 257, 857 S.E.2d 896 (2021) (Court disbarred lawyer for numerous matters, including failure to respond to numerous inquiries from a client seeking an update on the client's case).

7. *Matter of Brooker*, 433 S.C. 232, 857 S.E.2d 553 (2021) (public reprimand for failing to communicate with a client and failing to file suit in the client's case).

8. *Matter of Norton*, 433 S.C. 115, 857 S.E.2d 1 (2021) (1-year suspension for numerous matters including failing to keep clients reasonably informed about their cases).

9. *Matter of Schnee*, 432 S.C. 500, 854 S.E.2d 840 (2021) (Court disbarred lawyer for numerous matters including failure to communicate with numerous clients).

Rule 1.4, RPC, provides:

(a) A lawyer shall:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(g), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Again, this is one of the chief complaints about lawyers, and is one of the easiest problems to avoid. Return phone calls and respond to letters from clients, judges or other lawyers. Create a telephone log system and check it first thing in the morning. Check off each call as returned.

If you cannot make the call yourself, have an assistant or someone else do it for you. Carve out some time each day devoted *solely* to returning calls. Make a note in your case management or note system that the call was returned, and the substance of the communication. Your best defense against a claim of lack of communication is a well-documented file.

IV. Documenting the File

The best defense to most claims of a violation of the RPC is a well-documented file. This serves the dual function of providing evidence to undercut allegations of failure to communicate while permitting anyone who pulls the file to know what has taken place.

At my former law firm we used "Needles," a case management program that permits entry of notes and posting of emails and documents. The program will generate a report of all activity. We use Time Matters at ODC, which has a feature permitting the user to enter notes or save emails. The best practice is to use a similar case management tool.

Prepare detailed notes of conversations and other interactions with persons relevant to the file. Confirm discussions in writing if possible (with a follow-up letter or email), and post a copy of the writing to the file. Make certain that deadlines are placed on calendars (yes, plural - redundancy prepares for failure of one mode). Note crucial things with tabs in the physical file – deadlines, liens, specific instructions from the client. Someone should be able to pick your file up and be conversant with the client, another lawyer, or a judge about the status of the case.

If a complaint is made to ODC, we will request a copy of your file, including your notes. These notes provide a means of defeating spurious or false claims about communication or the goals of the representation.

Although it may seem to be too time consuming to do this, there is NOTHING more time consuming than responding to a complaint about your actions. And if the file is not appropriately documented, you will lack proof and more time will be wasted trying to reconstruct your actions from memory. Do not fall into this trap.

Document, document, document.

V. Duty to Report

The duty to report is found in Rule 8.3, RPC, and is one of the most difficult duties we have as lawyers. The law is a self-policing profession, yet we are all reluctant to flash our badges at times.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Lawyer Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.

(b) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(c) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office in other respects shall inform the appropriate authority.

(d) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(e) Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the

lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. The South Carolina version of paragraph (c) modifies the model version by specifically including "honesty" and "trustworthiness" to parallel the requirement of paragraph (b).

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client lawyer relationship.

[5] Paragraph (e) encourages lawyers to seek assistance from the South Carolina Bar Lawyers Helping Lawyers Committee, from a South Carolina Bar law office management assistance program, or from an equivalent county bar association program without fear of being reported for violating the Rules of Professional Conduct. Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (b) and (c) of this Rule

> encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Rule 8.3 provides a good deal of leeway in most circumstances. As the comments reveal, not every violation of the RPC or the RLDE requires a report – only those violations that raise "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects...." The comments provide some guidance for applying Rule 8.3.

An excellent discussion of the Rule with references to Ethics Advisory Opinions is found in the book by Professor Crystal the South Carolina Bar publishes. *See Annotated South Carolina Rules of Professional Conduct – 2021 Edition*, pp. 428-433.

Some recent decisions in which a failure to report was part of the finding of misconduct are:

1. *Matter of MacLean*, Op. No. 28044 (S.C. Sup. Ct. filed July 7, 2021) (Shearouse Adv. Sh. No. 23 at 14)

> "Respondent failed to notify the Commission in writing within fifteen days of being arrested and charged (with several drug offenses). Although the charges ultimately resulted in dismissal, Respondent admits her conduct violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 8.3(a) (requiring a lawyer to report being charged with a serious crime within fifteen days); Rule 8.4(b) (criminal act that reflects adversely on her fitness as a lawyer); and Rule 8.4(e) (conduct prejudicial to the administration of justice)."

2. Matter of Rivers, 409 S.C. 80, 761 S.E.2d 234 (2014)

> Lawyer disbarred for, among other things, failing to report that he had learned his partner was misappropriating client funds, forging documents, and lying to clients.

3. *In re Steinmeyer*, 395 S.C. 296, 718 S.E.2d 426 (2011)

> "In 2007, respondent self-reported witnessing her former employer, a lawyer, violate several provisions of the Rules of Professional Conduct. Respondent reported that the lawyer's violations occurred as early as 2004 and admits that her self-report in 2007 was untimely."

4. *In re Bowden*, 364 S.C. 310, 613 S.E.2d 367 (2005)

"Respondent was hired as an associate to manage the Greenville office of the Forquer Law Firm. Respondent worked under the supervision of Robert Forquer who is not licensed in South Carolina and who works in the firm's Charlotte, North Carolina, office. When respondent learned it was the firm's practice to inflate government recording fees on HUD-1 settlement statements, he questioned Mr. Forquer about the practice. Mr. Forquer assured respondent that the practice was ethical and legal."

5. *In re Galmore*, 340 S.C. 46, 530 S.E.2d 378 (2000)

"Respondent took over representation of Jasper Boykin in an action against Allstate Insurance Company when Ernest Yarborough, who originally represented Mr. Boykin, was suspended from the practice of law. During the course of the litigation, respondent contacted Thomas C. Salane, Esquire, attorney for Allstate, and indicated that he was going to move to be relieved as counsel due to his inability to handle the matter. A motion to withdraw was filed and granted on August 1, 1997.

However, respondent reappeared as counsel for Mr. Boykin, and continued to represent him until several months later when he again requested to be relieved. On December 5, 1997, an order was issued allowing respondent to be relieved as counsel. Mr. Boykin was thereafter represented by different counsel.

On April 30, 1998, a settlement of the litigation was arranged by the parties and confirmed in writing. A conditional order of dismissal was issued, allowing either side to petition for reinstatement if the settlement was not consummated within sixty days.

On May 12, 1998, an order for hearing on settlement was issued. The order was precipitated by a letter from Mr. Boykin to the judge, complaining that he did not agree to the settlement. Mr. Boykin stated in the letter that he had spoken with Yarborough and respondent about his case and had agreed to pay Yarborough $2,300 to oversee respondent's handling of the case and to pay respondent an additional $1,000.

Respondent later maintained he was unaware of the payment by Mr. Boykin to Yarborough. Respondent refused to allow Yarborough to work on the case or supervise his work. However, respondent failed to report to the Commission Yarborough's offer to practice law while under suspension."

VI. Civility Oath

The "Civility Oath" is found in Rule 402(h), SCACR. Everyone who is admitted to practice law in South Carolina has not only read it, they have sworn to uphold its provisions. The Supreme Court takes this oath very seriously.

For instance, Rule 7(a)(6), RLDE, provides it "shall be a ground for discipline for a lawyer to...violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR." Such conduct can also lead to a finding that the lawyer violated Rule 8.4(e), RPC, which provides "It is professional misconduct for a lawyer to.... engage in conduct prejudicial to the administration of justice...." The Comments to Rule 8.4 explain:

> [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Note that last sentence. A *Batson* violation, standing alone, does *not* establish a violation of Rule 8.4(e).

The Supreme Court has expressed increased concern over civility for the last decade, even after adopting the "new" oath. The Court stated:

> [F]or the benefit of the bar, we take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication. We are concerned with the increasing complaints of incivility in the bar. We believe United States Supreme Court Justice Sandra Day O'Connor's words elucidate a lawyer's duty: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 8 (1998).

In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 332, 709 S.E.2d 633, 635 (2011).

A stark example of the Court's application of the civility oath is *Matter of Traywick*, ___ S.C. ___, 860 S.E.2d 358 (2021). The Court placed a Charleston lawyer on interim suspension following ODC's receipt of 46 separate complaints regarding statements the lawyer made on his Facebook page. The page's privacy setting was "public," he identified himself as a lawyer, and

he referenced his law firm. The Court noted ODC claimed 12 of the statements violated Rule 402(h)(3) and stated:

> All twelve of Respondent's statements are troubling. Nevertheless, we focus our analysis on only two of them. We do this mindful of Respondent's right to freedom of speech under the First Amendment to the United States Constitution. Importantly, however, Respondent does not raise a First Amendment challenge to discipline. His attorney wrote the Court after oral argument stating, "We do not think it is necessary for the Court to address First Amendment issues." For this reason, we will not analyze the impact of the First Amendment.
>
> On April 5, 2020, Respondent posted an offensive comment regarding tattoos to his Facebook page. In the comment, he challenged his readers, "Prove me wrong. Pro tip: you can't." A reader wrote back suggesting Respondent prove he was right regarding his theory about tattoos. Respondent then stated,
>
> > The general statement has exceptions, such as for bikers, sailors, convicts or infantry. But these college educated, liberal suburbanites. No, the rule was written for these boring mother fuckers. And they are everywhere. Fuck em. Especially these females, Jesus Christ!
>
> On May 25, 2020, George Floyd—a black man—was murdered by a white police officer in Minneapolis, Minnesota. The racially-charged atmosphere that resulted from Mr. Floyd's murder is well-known. On June 3, 2020, at the height of this racially-charged intensity, Respondent posted the following to his Facebook page,
>
> > Here's how much that shitstain's life [Mr. Floyd] actually mattered: Stock futures up. Markets moved higher Monday and Tuesday. Fuck you. Unfriend me.
>
> We find these two comments warrant a six-month suspension. These comments are not expressive; they are expressly incendiary. Both are statements by a lawyer on his social media account identifying him as such and listing the name of his law firm. The statements were intended to incite, and had the effect of inciting, gender and race-based conflict beyond the scope of the conversation Respondent would otherwise have with his Facebook "friends." The fact Respondent is a lawyer exacerbated this effect.
>
> We are particularly concerned with the statement regarding Mr. Floyd. We find this statement was intended to incite intensified racial conflict not only in Respondent's Facebook community, but also in the broader community of

> Charleston and beyond. We hold this statement in particular tended to bring the legal profession into disrepute, violated the letter and spirit of the Lawyer's Oath, and constitutes grounds for discipline under Rules 7(a)(5) and 7(a)(6), RLDE, Rule 413, SCACR.

Matter of Traywick, 860 S.E.2d at 359. The Court ordered the suspension to be retroactive to the date of interim suspension. The Court added:

> We further impose the following conditions to which Respondent consented in the Agreement or at oral argument: (1) within one year from the date of this Opinion, Respondent shall complete at least one hour of diversity education approved by the Commission on Continuing Legal Education and Specialization; (2) within three months from the date of this Opinion, Respondent shall complete a comprehensive anger management assessment with a licensed mental health doctor or therapist; (3) also within three months, Respondent shall undergo an evaluation through the Lawyers Helping Lawyers program of the South Carolina Bar; (4) for a period of one year from the date of this Opinion, Respondent shall comply with any and all recommendations from these assessments, including treatment; (5) for a period of one year from the date of this Opinion, Respondent shall report quarterly to the Commission, including submitting an affidavit of compliance and a statement from the provider of any recommended treatment; and (6) within thirty days of the end of the one-year period beginning with the date of this Opinion, Respondent shall file with the Commission a final report from any treatment provider, including a complete assessment of Respondent's mental health status and specifically addressing Respondent's compliance with the recommended course of treatment. The report must also contain the treatment provider's recommendations for future treatment, if any.
>
> Within thirty days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan with the Commission to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

Traywick, 860 S.E.2d at 360.

Some recent decisions discussing the civility oath are:

1. *Matter of Anderson*, ___ S.C. ___, 557 S.E.2d 888 (2021) (lawyer engaged in a sexual relationship with a domestic relations client during the representation; Court accepted agreement that the behavior violated, among other things, the civility oath in Rule 402(h)(3), SCACR; Supreme Court entered a public reprimand).

2. *Matter of Smiley*, ___ S.C. ___, 857 S.E.2d 894 (2021) (lawyer failed to communicate with a client and failed to respond to ODC's notice of investigation, claiming his failure was "because he is a busy trial lawyer and he struggles to carve out time to open his mail, file correspondence, or otherwise mind the administrative aspects of his practice; Supreme Court entered a 4-month suspension).

3. *Matter of Schnee*, 432 S.C. 500, 854 S.E.2d 840 (2021) (lawyer engaged in numerous incidents of misconduct, including lying to several circuit court judges, lying to the Court of Appeals clerk, falsely claiming to a circuit court judge that he was working undercover for the US Attorney in a whistleblower matter against the SC Office of Indigent Defense, lying to clients, neglecting legal matters, and abandoning his practice; Court found, among other things, a violation of Rule 402(h)(3), SCACR, and disbarred the lawyer).

4. *Matter of Smith*, 432 S.C. 84, 850 S.E.2d 363 (2020) (lawyer engaged in an extended pattern of deception regarding the status of cases, repeatedly lying to clients, lawyers and courts about the cases; Court disbarred her, holding she violated numerous rules including the civility oath).

5. *Matter of Swan*, 422 S.C. 328, 811 S.E.2d 777 (2018) (lawyer engaged in "raunchy banter or jokes" with jailed women clients, and violated the trust of jail officials by sneaking e-cigarettes to two clients; Court found a violation of several provisions of the RPC as well as the civility oath).

6. *Matter of Lord*, 421 S.C. 394, 807 S.E.2d 696 (2017) (among other things, lawyer responded to a negative review on AVVO, calling the client "ungrateful" and added "to my former client: Do me a favor. The next time you are arrested, call a public defender and see what happens after you sit in jail for 3 months they might get around to sending you a form letter. Good luck."; after receiving a private admonition for the post the lawyer failed to remove it, resulting in another investigation; the Court imposed a public reprimand in part under the civility oath).

7. *Matter of Duffy*, 414 S.C. 181, 793 S.E.2d 299 (2016) (family court practitioner sent a letter regarding a case to a family court judge but failed to copy opposing counsel, informed the judge that her client had filed a grievance against the judge, requested an order of permanent recusal, and further stated there were concerns of serious "home cooking" in the case; the lawyer also told another judge that the first judge was recused from all of her cases even though this was not true; the Court imposed a public reprimand in part under the civility oath).

8. *Matter of Naert*, 414 S.C. 181, 777 S.E.2d 823 (2015) (lawyer created internet advertising campaign using Google Adwords to intercept searches regarding a defense firm and responding in derogatory manner; the Court imposed a public reprimand in part under the civility oath).

9. *Matter of Cutchin*, 412 S.C. 144, 771 S.E.2d 845 (2015) (lawyer essentially abandoned his practice without notice to clients, commingled and misappropriated funds, and failed to cooperate with ODC; Court disbarred him in part under the civility oath).

10. *Matter of DuPree*, 401 S.C. 553, 737 S.E.2d 849 (2013)

"While vacationing in Utah, respondent was a passenger in a vehicle that was pulled over by law enforcement on March 22, 2012. Utah Highway Patrol Trooper David Wurtz asked the driver for his license, vehicle registration, proof of insurance, and other information. Trooper Wurtz began to ask the driver about whether he had been drinking. Respondent repeatedly interrupted and told the driver not to answer the trooper's questions. Respondent told Trooper Wurtz he was a lawyer and that the driver did not have to do what the trooper asked.

Trooper Wurtz called for backup and other troopers arrived on the scene. When Trooper Wurtz requested the driver exit the vehicle, respondent, who was obviously intoxicated, became belligerent, repeatedly used profanity, and refused to cooperate with the troopers' requests to calm down. Respondent again reminded the troopers he was a lawyer. When the troopers told respondent to stay in the vehicle, he tried to get out. A few minutes later, when the troopers asked respondent to get out of the vehicle so it could be towed, respondent refused and locked the vehicle doors every time the troopers unlocked the doors. Respondent continued to berate the troopers and call them derogatory names.

The troopers were required to use force to remove respondent from the vehicle. One of the troopers deployed his TASER, but it did not function properly. When the troopers managed to remove respondent from the vehicle, respondent attacked the troopers. During the attack, respondent struck Trooper Wurtz in the mouth and bit him on the arm. Eventually, respondent was subdued and taken into custody. He was arrested and charged with two counts of assault on a police officer, disorderly conduct, resisting arrest, and public intoxication.

On September 12, 2012, respondent, through counsel, pled guilty to two counts of assault, one count of interference with a peace officer making a lawful arrest, and one count of failure to disclose identity, all misdemeanors. The pleas were entered *nunc pro tunc* to March 22, 2012, the date of respondent's arrest. Respondent was sentenced to one hundred and eighty (180) days on each charge, concurrent. The sentences were stayed and respondent was placed on probation for six (6) months under the following conditions: maintaining good behavior and no violation of any laws, payment of a $1,500.00 fine, payment of $840.52 to the Utah Worker's Compensation Fund, receipt of a substance abuse evaluation and completion of all recommended treatment, delivery of two letters of apology, one to Trooper Wurtz and one to another trooper, and service of one (1) day in the Summit County Jail with credit for one (1) day previously served. On September

17, 2012, the Third District Court in and for Summit County, Utah, found the conditions had been satisfied."

11. *Matter of Boyd*, 399 S.C. 356, 731 S.E.2d 876 (2012)

[O]n August 9, 2010, the Court suspended respondent from the practice of law for six months. Id. He was reinstated to the practice of law on June 14, 2011. *In the Matter of Boyd*, 393 S.C. 159, 711 S.E.2d 898 (2011). Prior to his suspension, respondent worked for a law firm. At the time, a law student named Richard Thomas RoeFN1 worked at the same firm.

FN1. Richard Thomas Roe is a pseudonym.

In May 2011, Claimant A had a pending matter before the Workers' Compensation Commission. Michael Petit, Esquire, represented the insurance carrier on Claimant A's claim.

On May 25, 2011, after Richard Thomas Roe was sworn-in as a member of the South Carolina Bar and while respondent was suspended from the practice of law, respondent sent a letter to Mr. Petit on behalf of Claimant A under the assumed name of Tom Roe. The May 25, 2011, letter was on the letterhead of a fictitious law firm that respondent called "Roe Law, LLC." The address on the letterhead was respondent's home address. The telephone number on the letterhead was respondent's cell phone number. Respondent's May 25, 2011, letter included a Notice of Appearance on Behalf of Claimant A with the Workers' Compensation Commission signed by respondent using the assumed name Tom Roe.

Believing that respondent was an attorney named Tom Roe, Mr. Petit prepared a settlement agreement and forwarded it to respondent at the address on the letterhead. On May 28, 2011, respondent signed the settlement agreement on behalf of Claimant A using the assumed name Tom Roe. The settlement agreement was filed by Mr. Petit who was unaware at the time that Tom Roe was a name fabricated by respondent.

On June 9, 2011, respondent sent a copy of the Notice of Appearance on Behalf of Claimant A, signed by respondent using the assumed name Tom Roe, to the Workers' Compensation Commission by email using the email address which included the phrase "tomroelaw@." The same day, the Workers' Compensation Commission issued a notice of settlement hearing to be held on June 14, 2011.

On June 10, 2011, respondent telephoned the South Carolina Bar from his cell phone and left a message identifying himself as Tom Roe and requesting an address change for bar member Tom Roe. A member of the staff at the Bar returned the call and left a voice mail message with instructions about how to change the address.

On June 13, 2011, respondent faxed a document entitled "Termination of Attorney/Client Relationship" to Mr. Petit under the assumed name Tom Roe. On June 14, 2011, the settlement hearing was held by Workers' Compensation Commissioner Derrick Williams. Claimant A did not appear and no one appeared on his behalf.

On June 15, 2011, at approximately 9:00 a.m., respondent called the South Carolina Bar a second time, falsely represented himself as Tom Roe, and requested that the address on file for that attorney be changed. The address respondent requested that the Bar use was his home address. At approximately 10:00 a.m. on June 15, 2011, Commissioner Williams held a conference call in which he called the number in the file for "Tom Roe." Mr. Petit also participated in the conference call. Respondent answered the call and falsely identified himself as Tom Roe. During the conference call, respondent falsely stated that he was a graduate of Clemson University and the Charleston School of Law. He gave Commissioner Williams the bar number for Richard Thomas Roe.

On June 22, 2011, respondent appeared at a rescheduled hearing before Commissioner Williams, falsely identified himself as Tom Roe, and gave a false bar number to the commissioner. At that hearing, respondent requested to be relieved from representation of Claimant A. Commissioner Williams instructed respondent to submit a written motion and proposed order. On June 24, 2011, respondent submitted a Motion to be Relieved as Counsel for Claimant A to the Workers' Compensation Commission. Respondent signed the name "Tom Roe" to the motion.

12. *Matter of Hursey*, 395 S.C. 527, 719 S.E.2d 670 (2011)

The Panel found Respondent had committed the following Acts: * * * maintained a webpage on MySpace.com that contained profanity and nudity along with the name of his law firm and the city of its location; among his comments, Respondent stated he would "take the 5th" in regards to what drugs he had done in the past as well as which drugs he had done in the past week (The Disciplinary Counsel Matter).

13. *Matter of Lovelace*, 395 S.C. 146, 716 S.E.2d 919 (2011)

Respondent represented the plaintiff in a civil suit. On April 2, 2008, the deposition of the plaintiff had just concluded and respondent was preparing to take a second deposition. The deponent in the second case was a defendant in the lawsuit. Respondent asked if anyone wanted to take a break. The defendant, who was seated across the table from respondent, said something to the effect of "No, let's get this crap over with." Respondent then stood up and pointed at the defendant's face and warned him not to speak to him in that manner. The defendant stood up and told respondent not to point his finger at him. Respondent then slapped the defendant in the face.

The defendant initiated criminal charges of simple assault and battery against respondent. Respondent pled "no contest" and was sentenced to payment of a fine.

Respondent self-reported this incident to ODC on the day it occurred.

14. *Matter of Poff*, 394 S.C. 37, 714 S.E.2d 313 (2011)

The Panel and the Court found the lawyer assisted an employee in defrauding Medicaid. The Court stated:

> Rule 7.4(a)(5) provides a venue for discipline when a lawyer engages in conduct tending to pollute the administration of justice or conduct that brings disrepute to the legal profession. Respondent's assistance in deceiving the government, engagement in fee sharing, mishandling of his trust account, and improper disclosure of confidential client information to a third party certainly brought disrepute to the legal profession. Rule 7.4(a)(6) provides a ground for discipline when a lawyer violates the oath of office. Respondent's actions caused him to violate his oath that he would "respect and preserve inviolate the confidences of my clients" and would "maintain the dignity of the legal system." Rule 402(k), SCACR. We do not believe it was necessary for the Panel to expound upon its reasoning for finding these grounds for discipline, as they are commensurate with its finding that Respondent committed numerous violations of the Rules of Professional Conduct. Like the Panel, we find Respondent in *52 violation of Rule 7(a)(1), 7(a)(5), and 7(a)(6), RLDE, Rule 413, SCACR.

15. *Matter of Walker*, 393 S.C. 305, 713 S.E.2d 264 (2011)

In August 2010, respondent pled guilty to solicitation of a felony. Specifically, respondent admitted attempting to hire a "hit man" to murder another member of the South Carolina Bar. Respondent paid the "hit man" in part with a post-dated check because he did not have sufficient funds in his account to pay the check's face value. Respondent was sentenced to ten (10) years imprisonment, suspended upon service of three (3) years imprisonment and five years of probation.

16. *In re Anonymous Member of SC Bar*, 392 S.C. 328, 709 S.E.2d 633 (2011)

The formal charges in this matter arose out of a disciplinary complaint regarding an e-mail message Respondent sent to opposing counsel (Attorney Doe) in a pending domestic matter. Respondent represented the mother and Attorney Doe represented the father in an emotional and heated domestic dispute. It was within this context that Respondent sent Attorney Doe the following e-mail (the "Drug Dealer" e-mail):

> I have a client who is a drug dealer on ... Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near ... Street. Think about it. Am I right?

Attorney Doe's spouse, also an attorney, filed the complaint in this matter after Attorney Doe disclosed the "Drug Dealer" e-mail to him. At the hearing, Respondent admitted that Attorney Doe's daughter had no connection to the domestic action.

At the hearing, Respondent asserted that the e-mail was in response to daily obnoxious, condescending, and harassing e-mails, faxes, and hand-delivered letters from Attorney Doe. These communications allegedly commented on the fact that Respondent is not a parent and therefore could not advise Respondent's client appropriately. In support of this contention, Respondent submitted five e-mail exchanges between Respondent and Attorney Doe, four of which were dated after the "Drug Dealer" e-mail. In further support of Respondent's assertions, Respondent claimed to possess ten banker's boxes full of e-mails and other documents that constituted daily bullying from Attorney Doe; however, these documents were not produced. Due to a lack of evidence supporting Respondent's assertions, the Panel found Respondent's testimony to be entirely lacking in credibility. Ultimately, the Panel found Respondent was subject to discipline for sending the "Drug Dealer" e-mail to Attorney Doe.

17. *Matter of White*, 391 S.C. 581, 707 S.E.2d 411 (2011)

"In 2004, Respondent represented the Atlantic Beach Christian Methodist Episcopal ChurchFN1 ("Church") in a legal action it filed against the Town regarding a zoning dispute. The Town Attorney was Charles Boykin. The parties settled the action in 2007. As part of the settlement, the Church's action was dismissed, the Town paid damages to the Church, and the Church promised future compliance with all of the Town's building, permitting, and zoning requirements.

FN1. It also appears in the record as the Christian Methodist Episcopal Mission Church.

On April 30, 2009, Kenneth McIver, the new Town Manager, sent a notice about the need for zoning compliance to the owners of the Church property, Vonetta M. Nimocks and Eboni A. McClary ("Church's Landlords"). In his notice, McIver stated that as part of the prior settlement, "the judge ordered that the Church must comply with the Town's Zoning Ordinances and that a request for compliance must come from you, the owner[s]." McIver copied the notice to the Church's pastor, who gave it to Respondent.

On May 6, 2009, Respondent sent a letter about McIver's notice to the Church's Landlords. Respondent sent copies of his letter to McIver and Boykin. The remarks made by Respondent in his May 6th letter are the subject of this disciplinary proceeding. The letter reads in full as follows:

> You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no Order. He also has no brains and it is questionable if he has a soul. Christ was crucified some 2000 years ago. The church is His body on earth. The pagans at Atlantic Beach want to crucify His body here on earth yet again.
>
> We will continue to defend you against the Town's insane [sic]. As they continue to have to pay for damages they pigheadedly cause the church. You will also be entitled to damages if you want to pursue them.
>
> First graders know about freedom of religion. The pagans of Atlantic Beach think they are above God and the Federal law. They do not seem to be able to learn. People like them in S.C. tried to defy Federal law before with similar lack of success.

McIver delivered the letter to the Town Council, and three council members thereafter filed a disciplinary complaint against Respondent. ODC instituted formal charges against Respondent as a result of his conduct.

At the hearing on June 8, 2010, counsel for ODC stated: "ODC alleges that [Respondent's] statements questioning whether Mr. McIver has a soul, saying that he has no brain, calling the leadership of the Town pagans and insane and pigheaded violates his professional obligations, which include his obligation to provide competent representation to his clients; his obligation under Rule 4.4 to treat third parties in a way that doesn't embarrass them; Rule 8.4 to behave in a way that doesn't prejudice the administration of justice; and also [ ] the letter was not in conformity with his obligations under his oath of office, Rule 402(k)." Counsel for ODC further alleged that Respondent had failed to cooperate with disciplinary authority by refusing to answer the allegations against him, threatening to sue the complainants for filing the grievance, and questioning ODC's authority.

* * *

Respondent argues the rule contains its own "safe harbor" that protects "uncivil" remarks when they serve other purposes. However, the fact that the letter could have served other purposes does not prevent his conduct from being in violation of Rule 4.4(a). See, e.g., *In re Norfleet*, 358 S.C. 39, 595 S.E.2d 243 (2004) (finding an attorney who became angry and spoke in a threatening manner to a school principal who refused to turn over a student's file had violated Rule 4.4; the attorney was attempting to obtain the file for the otherwise legitimate purpose of using it in litigation).

Moreover, an attorney may not, as a means of gaining a strategic advantage, engage in degrading and insulting conduct that departs from the standards of civility and professionalism required of all attorneys. *See In re Golden*, 329 S.C. 335, 341, 496 S.E.2d 619, 622 (1998) (determining the attorney's conduct in questioning a witness by using sarcasm, unnecessary combativeness, threatening words, and intimidation served no legitimate purpose other than to embarrass, delay, or burden another person and, even if the witness was being uncooperative, it would not justify the attorney's insulting conduct, which was found to have "completely departed from the standards of our profession" as well as "basic notions of decency and civility").

It is clear from the record in this matter that Respondent sent the letter as a calculated tactic to intimidate and insult his opponents. Although Respondent maintains he used many of the words at the request of his client, the Church, Respondent cannot discharge his responsibility for his use of disparaging name-calling and epithets by simply stating he was asked to behave in this unprofessional manner by his client.

Respondent has also justified his conduct by arguing that he has a duty to provide zealous representation. We agree that an attorney has an obligation to provide zealous representation to a client. However, an attorney also has a corresponding obligation to opposing parties, the public, his profession, the courts, and others to behave in a civilized and professional manner in discharging his obligations to his client. Legal disputes are often emotional and heated, and it is precisely for this reason that attorneys must maintain a professional demeanor while providing the necessary legal expertise to help resolve, not escalate, such disputes. Insulting and intimidating tactics serve only to undermine the administration of justice and respect for the rule of law, which ultimately does not serve the goals of the client or aid the resolution of disputes.

* * *

After considering the record in this matter, we conclude Respondent has committed misconduct in the respects identified by the Hearing Panel, except for the allegation regarding the failure to cooperate. We further find the Hearing Panel's suggestion of a definite suspension is appropriate under the circumstances.

Based on Respondent's blatant incivility and lack of decorum in this instance and the aggravating factors found by the Hearing Panel, including his disciplinary history, we

impose a definite suspension of ninety days. We further order Respondent to complete the Legal Ethics and Practice Program administered by the South Carolina Bar within six months of reinstatement. Respondent's conduct in this matter reflects poorly on himself as a member of the legal profession and reflects negatively upon the profession as a whole. He represented to this Court at oral argument that in the future he will conduct himself in accordance with the RPC and treat all persons in a civil, dignified, and professional manner as is expected of all members of the South Carolina Bar. We expect nothing less."

CONCLUSION

The "Scope" portion of the Rules of Professional Conduct appears at the beginning, and practitioners often overlook it. The "Scope" provides context for the RPC as well as other rules governing a lawyer's conduct. The Scope provides (bold added):

> [1] **The Rules of Professional Conduct are rules of reason**. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.
>
> [2] **The Rules presuppose a larger legal context shaping the lawyer's role.** That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.
>
> [3] **Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.** The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[4] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[5] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[6] **Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.** The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[7] **Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.** The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary

> authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.
>
> [8] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Rule 407, SCACR., SCOPE.

> Finally, the Preamble to the Rules amplifies these notions:
>
> [7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
>
> * * *
>
> [13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Rule 407, Preamble.